United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1432

B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76 - 1432

UNITED STATES OF AMERICA

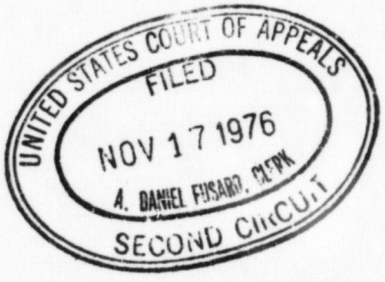
PLAINTIFF-APPELLEE

VS.

DAVID R. LEWIS, ET AL

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT-APPELLANT DAVID WILLIAMS



HOWARD C. ECKENRODE
COUNSEL FOR DEFENDANT-APPELLANT
147 BROAD STREET
MILFORD, CONNECTICUT 06460

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES iii

STATUTES INVOLVED iv

QUESTIONS PRESENTED vi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT

I. THE GOVERNMENT'S INTENTIONAL INTERFERENCE WITH THE GRAND JURY THROUGH INSTRUCTIONS TO IT BY AN ASSISTANT UNITED STATES ATTORNEY DIRECTING THE GRAND JURY NOT TO RETURN TO THE COURT AN INDICTMENT WHICH THE GRAND JURY HAD VOTED IN JULY, 1974, IDENTICAL IN FORM TO THE INSTANT INDICTMENT DENIED TO WILLIAMS DUE PROCESS OF LAW. 9

A. THE GOVERNMENT'S PURPOSEFUL PRE-INDICTMENT DELAY OF WILLIAMS IN ORDER TO GAIN A TACTICAL ADVANTAGE, RESULTING IN WILLIAMS' ALIBI WITNESSES' INABILITY TO CORROBORATE WILLIAMS' TESTIMONY AS TO HIS WHEREABOUTS ON THE DATE OF THE OFFENSE DENIED WILLIAMS' RIGHT TO DUE PROCESS OF LAW. 12

B. THE GOVERNMENT'S INTENTIONAL DELAY OF AT LEAST 18 MONTHS WHEN IT HAD SUFFICIENT INFORMATION TO OBTAIN A VOTE BY A GRAND JURY FOR INDICTMENT AND WHILE WILLIAMS WAS INCARCERATED, AND THE GOVERNMENT KNEW HE WAS INCARCERATED, DENIED WILLIAMS' RIGHT TO A SPEEDY TRIAL. 15

II. THE TRIAL JUDGE ERRED IN ALLOWING JULIAN JEFFERSON TO TESTIFY REGARDING THE AUGUST 31, 1973 BANK ROBBERY ON THE BASIS THAT IT WAS A PRIOR SIMILAR ACT TO SHOW A COMMON SCHEME OR IDENTITY. 17

III. THE TRIAL JUDGE ERRED IN CHARGING THE JURY THAT WILLIAMS' TESTIMONY REGARDING THE PARTICIPATION OF WASHINGTON AND LEWIS IN PRIOR BANK ROBBERIES SHOULD BE WEIGHED AS ACCOMPLICE TESTIMONY WITH CAUTION AND GREAT CARE. 21

IV. THE GOVERNMENT'S PREEMPTORY CHALLENGE OF THE ONLY TWO BLACK JURORS ON THE PANEL DENY WILLIAMS A FAIR TRIAL. 23

TABLE OF CONTENTS (Cont.)

PAGE(S)

V. UNDER THE TOTALITY OF THE CIRCUMSTANCES, WILLIAMS WAS DENIED A FAIR TRIAL.. 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES	PAGE
Dillingham v. United States 423 US 64 (1975)	16
Tillery v. United States, 411 F.2d 644 (5 Cir. 1969)	22
United States v. Augello, 452 F.2d 1135 (2 Cir. 1971)	14
United States v. Byrd, F.2d (2 Cir. 1965)	20
United States v. Deaton, 381 F.2d 114 (2 Cir. 1967)	17, 19
United States v. Feldman, 136 F.2d 394 (2 Cir. 1943)	19
United States v. Marion, 404 U.S. 316 (1971)	10, 13, 15
United States v. Alfonso-Perez, 525 F.2d 1362 (2 Cir. 1976)	26
United States v. Persico, 305 F.2d 534 (2 Cir. 1962)	14, 20
United States v. Ritchie, 128 F.2d 798 (3 Cir. 1942)	22
United States v. Robinson, 20 Cr. L 2084 (D. Conn. Oct. 15, 1976).	23

STATUTES

18 U.S.C. §2113 . . . . . iv, v

18 U.S.C. §2 v

RULES

Rule 6(f) F.R. Cr. P. 10

STATUTES INVOLVED

18 U.S.C. SECTION 2113

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from a person or presence of another, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan assocation; or,

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny-

shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to or in the care, custody, control, management or possession of a bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or,

Whoever takes and carries away with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan assocation, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever, in committing, or attempting to commit, any offense defined in sub-sections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. SECTION 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, or induces or procures its commission, is punishable as a principle.

QUESTIONS PRESENTED

1. WHETHER THE GOVERNMENT'S INTENTIONAL INTERFERENCE WITH THE GRAND JURY THROUGH INSTRUCTIONS TO IT BY AN ASSISTANT UNITED STATES ATTORNEY DIRECTING THE GRAND JURY NOT TO RETURN TO THE COURT AN INDICTMENT WHICH THE GRAND JURY HAD VOTED IN JULY 1974, IDENTICAL IN FORM TO THE INSTANT INDICTMENT DENY TO WILLIAMS DUE PROCESS OF LAW.

   A. WHETHER THE GOVERNMENT'S PURPOSEFUL PRE-INDICTMENT DELAY OF WILLIAMS IN ORDER TO GAIN A TACTICAL ADVANTAGE, RESULTING IN WILLIAMS' ALIBI WITNESSES' INABILITY TO CORROBORATE WILLIAMS' TESTIMONY AS TO HIS WHEREABOUTS ON THE DATE OF THE OFFENSE DENY WILLIAMS' RIGHT TO DUE PROCESS OF LAW.

   B. WHETHER THE GOVERNMENT'S INTENTIONAL DELAY OF AT LEAST 18 MONTHS WHEN IT HAD SUFFICIENT INFORMATION TO OBTAIN A VOTE BY A GRAND JURY FOR INDICTMENT AND WHILE WILLIAMS WAS INCARCERATED, AND THE GOVERNMENT KNEW HE WAS INCARCERATED, DENY WILLIAMS' RIGHT TO A SPEEDY TRIAL.

2. DID THE TRIAL JUDGE ERR IN ALLOWING IN JULIAN JEFFERSON'S TESTIMONY REGARDING THE AUGUST 31, 1973 BANK ROBBERY ON THE BASIS THAT IT WAS A PRIOR SIMILAR ACT OR COMMON SCHEME TO SHOW IDENTITY.

3. DID THE TRIAL JUDGE ERR IN CHARGING THE JURY THAT WILLIAMS' TESTIMONY REGARDING THE PARTICIPATION OF WASHINGTON AND LEWIS IN PRIOR BANK ROBBERIES SHOULD BE WEIGHED AS ACCOMPLICE TESTIMONY WITH CAUTION AND GREAT CARE.

4. DID THE GOVERNMENT'S PREEMPTORY CHALLENGE OF THE ONLY TWO BLACK JURORS ON THE PANEL DENY WILLIAMS A FAIR TRIAL.

5. WHETHER, UNDER THE TOTALITY OF THE CIRCUMSTANCES, WILLIAMS WAS AFFORDED A FAIR TRIAL.

STATEMENT OF THE CASE

On January 5, 1976, a Federal Grand Jury in New Haven returned a four count indictment charging David Williams and others with the robbery, with violence, of the West Side Office of the Connecticut National Bank, Stamford, Connecticut, on September 20, 1973.

On May 24, 1976, jury selection commenced before the Honorable Thomas F. Murphy, United States District Judge, and a jury of twelve and two alternates was selected and sworn.

On June 2, 1976, the indictment against co-defendant Arthur T. Hendrix, was dismissed and the defendant agreed to testify for the Government, and the Government called its first witness. The Government rested and the trial judge denied Williams' motion for judgment of aquittal.

On June 3, 1976, Williams called two witnesses including himself and rested.

On June 5, 1976, Judge Murphy declared a mistrial after receipt of a second note from the jury stating they could not reach a verdict.

On August 2, 1976, the second trial commenced with a jury of twelve and two alternates being selected and sworn. The Government called one witness.

On August 3, 1976, the Government rested, and the trial judge denied Williams' motion for judgment of acquittal.

On August 3, 1976, Williams offered three witnesses, including himself.

On August 4, 1976, Williams offered stipulated testimony concerning grand jury proceedings of July 1974 concerning the instant charges.

On August 4, 1976, Williams rested.

On August 5, 1976, the Court ruled that Count Four, the conspiracy count, would not be submitted to the jury, and the jury began its deliberations.

On August 6, 1976, the jury returned verdicts of guilty on Counts One, Two and Three.

On September 17, 1976, Judge Newman denied Williams' motions for judgment of acquittal and for a new trial.

On September 17, 1976, Judge Newman imposed imprisonment of twenty (20) years as a general sentence on all three counts, to commence on September 17, 1976 and to run concurrently with the unexpired portions of other federal sentences being served by Williams.

On September 21, 1976, notice of appeal was filed, and the appellant is presently serving his sentence.

STATEMENT OF FACTS

On September 20, 1974, the Connecticut National Bank, West Side Office, Stamford, Connecticut was robbed by four men wearing ski masks and dark suits. (Tr. 247-248).

Arthur Hendrix, originally a co-defendant, agreed to testify in return for that testimony, the indictment against him was dismissed prior to the commencement of the first trial in Waterbury. (Tr. 31). Hendrix testified that he committed the bank robbery with Joseph Daniels, David Lewis, David Williams, Richard Washington, and Aaron Stewart. (Tr. 30). On direct examination Hendrix testified that there were two meetings held on September 19, 1974 concerning the planning for the bank robbery at which meeting all participants were present with the exception of Richard Washington. (Tr. 39-41). However, on cross-examination, Hendrix was confronted with his grand jury testimony wherein he had testified that Richard Washington was present at those meetings, and on cross-examination he admitted that was his testimony at that time. (Tr. 97-99).

Hendrix continued testifying as to the roles that each of the participants were to play in the robbery. He was to obtain a getaway car, they were then to travel, caravan style to Connecticut. Joseph Daniels was to drive a second getaway car which was to be parked about a block away from the bank.

Once at the bank, David Lewis and Aaron Stewart entered through the rear, Hendrix and Williams entered through the front, and Richard Washington was to drive the first getaway car. On entering the bank, Williams had a pistol and Hendrix vaulted the counter and proceeded to the money drawers and took the money. Williams was with him and obtained the money from the drawers also. David Lewis was stationed by the back door with a shotgun covering the customers. Within a few minutes of entering, Hendrix yelled "time" and they all left the bank. Upon exiting the bank they found that the getaway car to be driven by Washington was not there but did arrive within a few seconds. They left the bank and met at Joe Daniels garage to split up the money. (Tr. 42-64). Hendrix, on direct examination, was shown Government's Exhibit 2 purporting to show photograph of the people robbing the bank and identified David Williams as one of the people shown in that photograph. (Tr. 70). On cross-examination, Hendrix identified in Government's Exhibit 2, as David Williams, a black male with a cap on the top of his head carrying a paper bag. (Tr. 111-112).

Margaret Perry, called as a Government witness, was a bank teller and present in the bank on the day of the robbery. (Tr. 247-248). Mrs. Perry was facing the front door when the two robbers, one of whom was identified as Williams by Hendrix, and observed the two men that entered the bank. She was also shown Government's

Exhibit 2, specifically the individual identified by Hendrix as being Williams, and asked if she could identify him in court and was unable to. (Tr. 256-257).

Judge Newman ruled that the testimony of Julian Jefferson relative to the August 31, 1973 robbery of a Long Island Bank would be admissible under the prior similar act doctrine on the issue of identity. (Tr. 139). Of particular interest, is that Judge Murphy ruled on the first trial that Jefferson's testimony would not be admissible on the case in chief. (Tr. 141-142).

Jefferson, who has a lengthy record of prior felony convictions (Tr. 176-177) and for whom the Government sent a favorable letter to the parole board in exchange for his testimony, (Tr. 176) was then allowed to testify. He testified that on August 31, 1973, he, Williams, Lewis, Washington, Daniels, and Moses Scarborough, robbed the Long Island Trust Co. (Tr. 178). Of particular importance is that in that bank robbery there were two different individuals participating, who did not participate in the instant bank robbery.

With respect to the manner in which the August 31, 1973 robbery was committed and the roles of the participants, Jefferson testified that it was his role to enter the bank and cover the customers which he did with a rifle. (Tr. 178). Additionally,

he testified that it was Williams' role also to cover the customers and he did so with a hand gun while Lewis, scooped up the money behind the counter. (Tr. 179). Scarborough's role is not revealed. Joe Daniels drove the getaway car from the bank while Washington drove the second or backup getaway car located some distance from the bank. (Tr. 180-183). This bank robbery, the manner in which it was committed, and the roles of the participants is contrasted with the testimony of Hendrix, previously set forth, which placed Lewis as the cover man while here Jefferson places him as scooping up the money, and Jefferson also described in this case that Williams was also a cover man while Hendrix testified in the instant bank robbery that Williams had the job of scooping up the money. In the instant bank robbery, Hendrix testified that Washington was to drive the getaway car from the bank while the bank robbery which Jefferson testified to was Washington's job. While in this bank robbery, Washington was to drive the second getaway car while in the instant bank robbery, Hendrix testified that Daniels was to drive the second getaway car.

Jefferson further testified that after the August 31, 1973 bank robbery, while dividing the proceeds of same, Williams had stated that the next target for banks would be Connecticut and that he thought Stamford, Connecticut was mentioned. Further, he stated that Lewis joined in and said that it would be a sweet job. (Tr. 187 and 188). However, on cross-examination,

when Jefferson was confronted with his prior testimony in the first trial, he admitted that it was his testimony at that time that it was Lewis that had spoken of Connecticut bank jobs. (Tr. 197-198, 200).

Williams took the stand in his own behalf and testified that on the day of the bank robbery, he left his home at about 9:00 a.m. and went to the place of employment of Gloria Burnette to discuss plans for his mother's birthday which was on September 20, 1973. (Tr. 382). To support his alibi, Williams called a witness, his wife, Shirley Williams, who testified that Williams had been employed during September of 1973 and particularly was employed on September 20, 1973. Further, he usually left the house between 9:00 a.m. and 9:30 a.m. (Tr. 300). She further testified that September 20, 1973 was Williams' mother's birthday, but that she could not recall when he left the house on that date. (Tr. 301-302).

Williams also called, in support of his alibi, Gloria Burnette, who also testified that Williams' mother's birthday was on September 20, 1973. (Tr. 331). She further testified that Williams usually came to her place of work around 9:00 a.m.for coffee. (Tr. 333). However, she testified that she could not recall if Williams had in fact come to her place of employment on that particular day, September 20, 1973. (Tr. 336).

Williams, in testifying in his own behalf, admitted his participation in the August 31, 1973 bank robbery of the Long Island Bank. (Tr. 419). Based on that testimony, Judge Newman

charged the jury that his charge regarding Jefferson and Hendrix as accomplices would also apply to the testimony of defendant Williams about the participation of Washington and Lewis in the prior bank robbery, and that Williams' testimony in implicating others in that robbery should be weighed with caution and great care. (Tr. 646). Counsel for Williams excepted to that portion of that charge to the jury as it related to Williams. (Tr. 649).

From a panel of 53 jurors, containing three blacks, the Government preemptly challenged the only two blacks drawn, leaving the defendants, all three of whom are blacks, with an all white jury. (Appendix 13-79).

There were two separate grand jury proceedings in this case. In the first proceeding in July, 1974, an indictment, identical to the present one, was voted by the grand jury and signed by the forman of the grand jury, the United States Attorney and the Assistant United States Attorney Dow. However, Assistant United States Attorney Dow, instructed the grand jury not to return the indictment to court, which instructions the grand jury followed. (Court Exhibits 1, 2 and 3). Between August and September of 1974, Williams testified in two separate trials as a Government witness in New York. (Tr. 545-546, and 368-369). The present indictment was returned on January 5, 1976, some eighteen months after the initial grand jury proceedings.[*]

* A new grand jury returned the January 6, 1976 indictment, as the July 1974 grand jury had expired by its own limitations. (Court Exhibits 1, 2 and 3).

ARGUMENT

I. THE GOVERNMENT'S INTENTION INTERFERENCE WITH THE GRAND JURY THROUGH INSTRUCTIONS TO IT BY AN ASSISTANT UNITED STATES ATTORNEY DIRECTING THE GRAND JURY NOT TO RETURN TO THE COURT AN INDICTMENT WHICH THE GRAND JURY HAD VOTED IN JULY, 1974, IDENTICAL IN FORM TO THE INSTANT INDICTMENT DENIED TO WILLIAMS DUE PROCESS OF LAW.

On or about July 25, 1974, the Government presented evidence to the grand jury at New Haven, Connecticut relative to the involvement of Williams in the offense charged in the indictment on which he stands convicted. That grand jury voted an indictment, it was signed by the foreman and by United States Attorney and Assistant United States Attorney Dow. (Court's Exhibit 2). However, on the instructions of Assistant United States Attorney Dow, the grand jury did not return that indictment to the court. Instead, the grand jury gave the indictment and related papers to the clerk's office where they remained until about May 1, 1976. Those documents were introduced in this case and are now Court's Exhibits 1, 2 and 3. The evidence presented by the Government in July, 1974, is substantially the same as was presented in the instant indictment which was returned January 5, 1976. (Statement of a U.S.A., Dow, Chambers Conference with Hon. T. J. Murphy, U.S.D. Judge, Appendix 12).

This indictment returned January 5, 1976 on which Williams

stands convicted, comes twenty-eight months after the crimes charged and some eighteen months after the Government formally focused upon Williams and secretly accused him of these crimes.

The delay in this case was not caused by mere governmental inaction as was the case in U.S. v. Marion, 404 U.S. 316 (1971), but rather from the affirmative act of a governmental official. Rule 6 (f), F.R. CRIM. P., provides that an indictment ".... shall be returned by the grand jury to a judge in open court." (Emphasis supplied). Once the grand jury votes an indictment there is no discretion vested in that body, much less the U.S. Attorney's Office, to withhold it from the court. Rule 6(f) thus embodies the Fifth Amendment guaranty of procedural due process requiring that once a grand jury votes an indictment, they must return it to court. Thus, Williams' constitutionally guaranteed right to have the indictment returned to court to be opened to the scrutiny of the court, the public and the defendant, has been circumscribed. Williams' right has been denied not by, perhaps, excusable mistake or inadvertence, but, by the direct intervention and interference of the Government.

The point here goes much further than an accused right to a speedy trial which, under U.S. v. Marion, Supra, is a relative right. Here, the grand jury judgment was to indict in July, 1974, and, but for the direct interference of the Government, they would have done so. The Court must be ever vigilent to preserve the

independence of the grand jury and to make sure that body does not become purely an arm of the prosecution. This flagrant abuse of the grand jury, resulting in a denial of Williams' right due process of law, requires that his conviction on all three counts be reversed.

I. A. THE GOVERNMENT'S PURPOSEFUL PRE-INDICTMENT DELAY OF WILLIAMS IN ORDER TO GAIN A TACTICAL ADVANTAGE, RESULTING IN WILLIAMS' ALIBI WITNESSES INABILITY TO CORROBORATE WILLIAMS' TESTIMONY AS TO HIS WHEREABOUTS ON THE DATE OF THE OFFENSE DENIED WILLIAMS' RIGHT TO DUE PROCESS OF LAW.

It is clear that the Government intentially delayed the indictment returned on January 5, 1976, by preventing the July, 1974 grand jury from returning the indictment they voted. Further, it is also clear that a tactical advantage was sought. The Government knew, quite obviously, that Williams was testifying in two separate cases against his co-defendants. (Tr. 543-545, 373-374). During the time Williams was testifying as a Government witness, September of 1974, he was asked if he had information relative to this bank robbery, and it was clear to Williams that the Government wanted him as a witness. (Tr. 372). Williams at that time told the Government that he did not know anything about this bank robbery and was in turn, told by the Government not to worry and to forget about it that he had been helpful enough to the Government. (Tr. 373-374). The obvious purpose of the Government in delaying the indictment in this case was to wait until Williams had finished testifying in the cases in New York with the hope that those against whom he had testified would then begin making statements against each other, including Williams. The prejudice to Williams, resulting from the pre-indictment delay, is that his two alibi witnesses could not corroborate Williams'

alibi for his whereabouts on the date of the robbery. Williams testified that September 20th is his mother's birthday. And, that on September 20, 1973, he left his home at approximately 9:00 a.m. and when to Gloria Burnette's office. While there he invited Miss Burnette to the gathering at his mother's house that evening. (Tr. 382). However, when Shirley Williams was called as a defense witness, while she recalled that Williams' mother's birthday was September 20th, and that a gathering had been planned for that evening, she could not recall at what time Williams had left the house on that day. (Tr. 301). The same situation applied to Gloria Burnette, although she recalled that David Williams' mother's birthday was September 20th, she could not remember whether David Williams had stopped at her office on September 20, 1973 to invite her to the party. ..(t)he due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellant's rights to a fair trial and that the delay was an intential device to gain tactical advantage over the accused." U.S. v. Marion, 404 U.S. 316, 324 (1971).

While it is recognized that mere lapse of memory of witnesses is ordinarily insufficient to reverse a conviction, it is urged that the Court look closely at the circumstances of this case.

In this case, the conviction of Williams resulted solely from the uncorroborated testimony of an accomplice. While it is true that the uncorroborated testimony of an accomplice is sufficient to convict, it is also true that testimony must be scrutinized with care. U.S. v. Augello, 452 F.2d 1135, 1140 (2 Cir. 1971). Again, while this prejudice may be deemed to be relatively minor, this court has held that where a Government's case rests entirely upon uncorroborated testimony of an accomplice, which in some respects was inconsistent with earlier testimony, which is the case here, the court will "...scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor". U.S. v. Persico, 305 F.2d 534, 536 (2 Cir. 1962). Accordingly, the prejudice, while deemed minor, coupled with the Government's intentional pre-indictment delay to gain advantage coupled with the fact that the conviction is based solely on uncorroborated accomplice testimony inconsistent in some regards requires the reversal of Williams' conviction on all three counts.

I. B. THE GOVERNMENT'S INTENTIONAL DELAY OF AT LEAST 18 MONTHS WHEN IT HAD SUFFICIENT INFORMATION TO OBTAIN A VOTE BY A GRAND JURY FOR INDICTMENT AND WHILE WILLIAMS WAS INCARCERATED, AND THE GOVERNMENT KNEW HE WAS INCARCERATED, DENIED WILLIAMS' RIGHT TO A SPEEDY TRIAL.

U.S. v. Marion, Supra, attaches the Sixth Amendment right to a speedy trial to the period after arrest. It must be noted that in that case, the defendants were at liberty, while in this case, Williams was in custody, albeit on other charges, since February of 1974. (Tr. 367-368). The effect, however, is the same had Williams been incarcerated on the charges alleged in the indictment filed on January 5, 1976 on which he stands convicted. Further, Williams was most certainly an accused in July of 1974, since the Government's case had been presented to the grand jury and an indictment voted. The effect of the Government's tactics in this case is the same whether or not the indictment was returned to court. The Government, without court action, held the defendant Williams to answer for the instant offenses since July, 1974. The result to Williams is even more oppressive than had the grand jury, unfettered by Government influence, returned the indictment to court. If that happened, Williams would have known that he was being held to answer for this charge and could have marshalled his defenses. Instead, the Government, in September of 1974, was telling him not to worry about the case, just to forget it because he had been helpful enough to the Government. (Tr. 373-374). It would be

naive to believe had Williams gained his liberty, the grand jury would have been permitted by the Government to hold the indictment in its breast pocket.

Where one has been held to answer for an offense, which Williams certainly was, although not actually arrested, and his trial delayed by the Government, the Sixth Amendment does not require a showing of actual prejudice caused by the delay. Dillingham v. U.S. 423 U.S. 64 (1975). Here, an 18-month delay intentially caused by the Government to gain a tactical advantage while Williams was incarcerated violates his Sixth Amendment right to a speedy trial and requires the reversal of all three counts of his conviction.

2. THE TRIAL JUDGE ERRED IN ALLOWING JULIAN JEFFERSON TO TESTIFY REGARDING THE AUGUST 31, 1973 BANK ROBBERY ON THE BASIS THAT IT WAS A PRIOR SIMILAR ACT TO SHOW A COMMON SCHEME OR IDENTITY.

The rule in this Circuit regarding evidence of similar acts, including other crimes, is that they are admissible "... if substantially relevant for a purpose other than merely to show defendant's criminal character or disposition.". U.S. v. Deaton, 381 F.2d 114, 117 (2 Cir. 1967). In the instant case, Judge Newman allowed Julian Jefferson to testify regarding Williams' participation in the August 31, 1973 robbery of the Long Island bank. To be admissible under the prior similar acts doctrine, the evidence of this prior crime, of course, must be similar. The only similarity between the bank robbery testified to by Jefferson and the bank robbery for which Williams stands convicted is that the three defendants convicted in this case allegedly participated in the Long Island robbery. (Tr. 178). Two other individuals who allegedly participated in the Long Island robbery to which Jefferson testified, namely, Jefferson and Scarborough, were not alleged to have participated in this bank robbery. (Tr. 178). Additionally, the roles of the alleged participants in the Long Island bank robbery and the defendants in this case were different. According to Jefferson's testimony, regarding the Long Island bank robbery, it was his job to cover the customers with a rifle. In the instant bank robbery, Hendrix testified that it was Lewis's job to cover the customers. (Tr. 178 and 54). Jefferson further testified that it was Lewis's job to

scoop up the money behind the counter. (Tr. 179). Jefferson testified that it was Williams' role in the Long Island robbery to cover the customers with a hand gun while in the instant bank robbery Hendrix testified that Williams' job was to scoop up the money behind the counter. (Tr. 53 and 17). With respect to the getaway cars, Jefferson testified that Joe Daniels drove the car from the bank while Richard Washington drove the second or backup getaway car located some distance from the bank. (Tr. 180-183). According to Hendrix's testimony, the roles of Daniels and Williams were just reversed in the instant bank robbery. (Tr. 50 and 51). Thus, the only similarity between the crime to which Jefferson testified to and the crimes charged in the instant case is that they were both robberies of a bank and included several of the same participants.

Judge Newman also allowed Jefferson to testify, over objection of defense counsel, that after the August 31, 1973 bank robbery while dividing the proceeds of that bank robbery, Williams had stated that the next target for banks would be Connecticut, and that he thought Stamford, Connecticut was mentioned. Further, Jefferson was allowed to testify that Lewis had joined in with Williams and said that it would be a sweet job. (Tr. 187 and 189). Although this is certainly not evidence of any prior criminal conduct, Judge Newman allowed it in apparently on the basis that it

was relevant to the planning of the Stamford bank robbery. Even if Jefferson's testimony was taken as true, it is hardly evidence of any prior planning since it is so general in nature as to be without any probative value, but, merely leads the jury to further believe that Williams is a bad person. It is important to note that on cross-examination, Jefferson was confronted with his prior testimony which he had given in the first trial on the Government's rebuttal case, and he admitted that it was his testimony at that time that it was Lewis, not Williams, that had spoken of Connecticut bank robberies to be done in the future. (Tr. 197-198, 200). The minimal probative value of that testimony, coupled with the fact that Jefferson had testified inconsistently on the first trial and further coupled with its highly prejudicial nature, should have rendered his testimony inadmissible.

The Government's entire case rested solely upon the uncorroborated testimony of the admitted accomplice, in this bank robbery, Hendrix. The admissibility of evidence of prior offenses is a matter in which the trial judge is allowed wide discretion. U.S. v. Feldman, 136 F.2d 394 (2 Cir. 1943). "...(T)he trial judge is required, as with any potential prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character." U.S. v. Deaton, 381, F.2d 114, 117 (2 Cir. 1967). When however, evidence of prior offenses are not of a substantially probative value or there is no real

necessity for it, its admission may be considered an abuse of discretion, with the better course of action for a trial judge to follow being to keep it out of the case in chief but allow it in rebuttal if required. U.S. v. Byrd F.2d 570, (2 Cir. 1965). That is in fact the course that Judge Murphy followed on the first trial. (Tr. 140-144). Under these circumstances, although the error might otherwise be deemed minor, this court must scrutinize the court's discretion with extreme care because of the great possibility of prejudice where the Government's case rests solely upon uncorroborated testimony of an accomplice which, in some respects, was inconsistent with his prior testimony. U.S. v. Persico, Supra. Accordingly, the convictions of Williams on Counts 1, 2 and 3 of the indictment should be reversed.

3. THE TRIAL JUDGE ERRED IN CHARGING THE JURY THAT WILLIAMS' TESTIMONY REGARDING THE PARTICIPATION OF WASHINGTON AND LEWIS IN PRIOR BANK ROBBERIES SHOULD BE WEIGHED AS ACCOMPLICE TESTIMONY WITH CAUTION AND GREAT CARE.

Williams, in testifying in his own behalf, admitted his participation in the August 31, 1973 bank robbery of the Long Island bank, and implicated the co-defendants in that robbery. (Tr. 419). Based on that testimony, Judge Newman charged the jury that his charge regarding Jefferson and Hendrix as accomplices would also apply to the testimony of Williams regarding the participation of Washington and Lewis in the prior bank robbery, and that Williams' testimony in implicating others in that robbery should be weighed with caution and great care. (Tr. 646). Counsel for Williams excepted to that portion the charge as it related to Williams. (Tr. 649).

It is obvious from the jury's verdict that they entirely discredited Williams' testimony. The charge, by drawing attention to Williams and although carefully limiting the charge to that portion of Williams' testimony concerning the roles of Washington and Lewis in the prior bank robbery, apparently affected the jury in weighing the balance of Williams' testimony. It should be noted that Williams' testimony did not implicate the two co-defendants in this bank robbery, but another bank robbery. The reason for an

instruction to carefully weigh an accomplice's testimony is because of its inherent untrustworthyness. Tillery v. U.S., 411 F.2d 644 (5 Cir. 1969). Only one case was found where the instruction regarding an accompliance testimony was applied to the defendant taking the stand in his own behalf. U.S. v. Ritchie, 128 F.2d 798 (3 Cir. 1942). The Court there approved the language of the judge in that case which was much less severe than in the present case. In U.S. v. Ritchie, Supra, at 800, the judge charged "...it was for the jury to determine how much of the testimony of the accomplices they would believe and that the same rule applied to the consideration of the defendant's testimony.".

Again, while this error is probably insufficient, standing alone, to require reversal of the case or require a new trial, when connected with the other errors, does require reversal.

4. THE GOVERNMENT'S PREEMPTORY CHALLENGE OF THE ONLY TWO BLACK JURORS ON THE PANEL DENY WILLIAMS A FAIR TRIAL.

From a panel of 53 jurors, containing three blacks, the Government preemptorily challenged the only two blacks drawn, leaving the defendants, all three of whom are blacks, with an all white jury. (Appendix ~~13-15~~).

Subsequent to the selection of the jury and the trial of this case, Judge Newman had occasion to consider the use by the Connecticut United States Attorney's Office of preemptory challenges to remove black jurors in those cases where there were black defendants. U.S. v. Robinson, 20 Cr. L2084 (D. Conn. October 15, 1976).

No objection was raised at trial to the Government's preemptorily challenging the two black jurors drawn from the panel. The reason being in that point in time, there was no basis for an objection as counsel did not have available nor were they aware of the statistics contained in Judge Newman's decision, nor were they aware of that decision.

It is conceded that, standing alone, the Government's use of its preemptory challenges to dismiss the black jurors is not sufficient to reverse or require a new trial. This is especially true in light of the fact that Judge Newman's decision was prospective only. However, taken as one of the circumstances which occurred

in this trial, it is urged in the following argument that it is a significant factor in depriving Williams of a fair trial.

Judge Newman, in U.S. v. Robinson, Supra, found that, statistically the Government excluded 69.5% of Black eligible jurors and 84.8% in cases of Black and Hisponic defendants through challenges. Further, in only 18.5% were Blacks seated as jurors or alternates whereas statistically at least one Black would be included in the 14 jurors selected approximately 50% of the time.

Accordingly, Williams' convictions should be reversed on all three counts.

5. UNDER THE TOTALITY OF THE CIRCUMSTANCES, WILLIAMS WAS DENIED A FAIR TRIAL.

Briefly, the totality of the circumstances in this case are as follows:

1. The Government intentionally caused a pre-indictment delay of 18 months through its instruction to a grand jury that it not return an indictment which it had voted accusing Williams of the identical crimes contained in this indictment.

2. The period between the first grand jury's unreturned indictment and the January 5, 1976 indictment, some 18 months, Williams was incarcerated, and the Government knew he was incarcerated.

3. The pre-indictment delay prejudiced Williams' defense in that his alibi witnesses could not recall his whereabouts on that date.

4. The Government used its preemptory challenges to remove the only two black jurors selected from the panel in order to assure an all white jury for the three black defendants.

5. The Government's entire case rested solely upon the uncorroborated testimony of Arthur Hendrix, an accomplice, who exchanged his testimony for dismissal of his case.

6. The Government was permitted to introduce evidence of prior criminal acts to show a common scheme or identity of the defendants.

7. The trial judge incorrectly instructed the jury to view a portion of Williams' testimony as accomplice testimony with caution and great care.

It is conceded, arguendo, that, individually the claimed errors are insufficient to require reversal of this case. However, the combination of the several claimed errors require dismissal of the case and this court has so held. U.S. v. Alfanso-Perez, 525 F.2d 1362 (2 Cir. 1976). Accordingly, all three counts against Williams should be reversed.

CONCLUSION

This was the second trial of this case, the first trial ending in a mistrial when the jury could not reach a verdict. The evidence against Williams was solely that of the uncorroborated testimony of an accomplice. For the reasons cited in this brief, in particular, the totality of the circumstances surrounding the trial, David Williams respectfully requests that his conviction on Counts 1, 2 and 3 be reversed or in the alternative a new trial be ordered.

Respectfully submitted,

HOWARD C. ECKENRODE
147 Broad Street
Milford, Ct. 06460
878-0688

Attorney for Appellant Williams

Date: November 12, 1976